

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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CHRISTINE ARBIB, Personal Representative of  
the Estate of EUGENE ARBIB,

UNPUBLISHED  
September 23, 2008

Plaintiff,

and

JAMES HALVORSEN, Successor Personal  
Representative of the Estate of EUGENE ARBIB,

Plaintiff-Appellee,

v

No. 276875  
Mackinac Circuit Court  
LC No. 05-006090-CK

BARRY PIERSON,

Defendant-Appellant,

and

CYNTHIA J. PIERSON,

Defendant.

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Before: Saad, C.J., and Sawyer and Beckering, JJ.

PER CURIAM.

Defendant, Barry Pierson, appeals from the trial court's order that granted summary disposition to plaintiff Christine Arbib under MCR 2.116(C)(10) and directed defendant<sup>1</sup> to pay

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<sup>1</sup> The trial court dismissed defendant Cynthia Pierson with prejudice and she is not a party to this appeal. Accordingly, we use "defendant" to refer only to Barry Pierson.

restitution to the estate of the decedent Eugene Arbib. For the reasons set forth below, we affirm.<sup>2</sup>

In 2003, decedent guaranteed a promissory note for defendant, his son-in-law, to borrow money from First National Bank (FNB), and decedent delivered to FNB a certificate of deposit (CD) as collateral. Following decedent's death, defendant defaulted on the loan and FNB took the proceeds of the CD to satisfy the amount owed under the promissory note. A separate will contest was litigated in probate court and is currently on appeal in this Court. In this case, plaintiff, as personal representative of decedent's estate, filed a claim to recover the amount of the forfeited CD from defendant under quasi-contract and unjust enrichment theories. Defendant maintained that the amount of the CD was a gift, but the trial court granted summary disposition to plaintiff because defendant failed to establish that decedent gave the CD to him as a gift.

Defendant claims that the trial court should not have ordered him to pay restitution to decedent's estate because he provided sufficient evidence to establish that the gift of the CD was perfected during decedent's lifetime.<sup>3</sup> To establish a valid gift, a party must show that the donor intended to transfer title gratuitously to the donee, actual or constructive delivery of the gift to the donee, and acceptance. *In re Handelsman*, 266 Mich App 433, 437-438; 702 NW2d 641 (2005). A valid inter vivos gift requires an absolute transfer of the property from the donor to the donee that takes effect immediately. *Geisel v Burg*, 283 Mich 73, 80; 276 NW 904 (1937).

We hold that the trial court correctly granted summary disposition to plaintiff because defendant presented insufficient evidence that decedent perfected delivery of a gift. Though decedent's children averred that they believed decedent intended to give the CD as a gift, defendant presented no direct evidence to establish this intent. Regardless, there was no evidence of actual or constructive delivery of a gift to defendant. The evidence merely established that decedent assigned and delivered a CD to FNB for defendant to receive a loan from FNB. Though defendant suggests that this constituted constructive delivery, it is undisputed that the CD would have been returned to decedent if defendant paid the loan or if decedent did so through his guarantee of the note. Instead, the CD was distributed to FNB because defendant defaulted on the loan. This does not constitute an absolute transfer of property by decedent to defendant.

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<sup>2</sup> Plaintiff James Halvorsen was appointed as successor personal representative of the estate during the pendency of this appeal.

<sup>3</sup> A trial court's decision on an equitable claim is reviewed de novo, *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005), as is a trial court's decision on a motion for summary disposition, *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Roberson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

Defendant claims that even if the gift was not perfected, the trial court erred by ordering him to pay restitution to the estate. In *In re McCallum Estate*, 153 Mich App 328, 335; 395 NW2d 258 (1986), this Court observed:

A person who has been unjustly enriched at the expense of another is required to make restitution to the other, Restatement Restitution, § 1, p 12. The process of imposing a ‘contract-in-law’ to prevent unjust enrichment is an activity which should be approached with some caution. The essential elements of such a claim are (1) receipt of a benefit by the defendant from the plaintiff and (2) which benefit it is inequitable that the defendant retain, *Hollowell v Career Decisions, Inc*, 100 Mich App 561, 570; 298 NW2d 915 (1980). Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it. There [sic-The] mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor, Restatement Restitution, *supra*, comment c, p 13. A person who without mistake, coercion or request has unconditionally conferred a benefit upon another is not entitled to restitution, except where the benefit was conferred under circumstances making such action necessary for the protection of the interests of the other or of third persons, Restatement, *supra*, § 112, p 461. See *Buell v Orion State Bank*, 327 Mich 43, 56; 41 NW2d 472 (1950).

Though the trial court did not analyze the issue, the facts of this case support the court’s order of restitution. It would be unjust for defendant to retain the value of the loan because the estate lost a substantial amount of money as a result of defendant’s failure to make payments on it. Defendant was unjustly enriched because he received substantial value without satisfying his obligation under the promissory note for which decedent was ultimately responsible. Under the circumstances, restitution was appropriate because it would be unjust to allow defendant to keep the value obtained from the CD.

Defendant further maintains that the trial court’s restitution order amounted to an attempt to enforce the terms of decedent’s 2003 will, which some family members are contesting in a separate probate court action. This issue is unpreserved, *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992), but we will review it because it involves a question of law and we have before us sufficient facts necessary for its resolution, *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). Defendant’s argument is misplaced because the trial court’s order cannot be interpreted as also enforcing the terms of the 2003 will. How the value of the CD and the remaining probate assets will be distributed is subject to probate administration, and the order plainly did not adjudicate anything related to the validity of the will.

Defendant asserts that summary disposition was premature because the parties did not finish discovery. Defendant failed to preserve this issue because he argued it for the first time in his motion for rehearing or reconsideration. See *Pro-Staffers, Inc v Premier Mfg Support Services, Inc*, 252 Mich App 318, 328-329; 651 NW2d 811 (2002). Nevertheless, we will review the issue. *Brown, supra* at 599. A trial court’s decision on a motion for reconsideration is reviewed for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). In opposing a motion for summary disposition because discovery is not

complete, the opposing party must provide independent evidence that a factual dispute exists. *Michigan Nat'l Bank v Metro Institutional Food Service, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993).

We hold that defendant has failed to show that discovery would have uncovered facts to demonstrate that decedent effectively delivered the CD to defendant, and the failure of delivery is what caused the gift to fail. Defendant does not explain what further discovery he would have conducted on this issue, and it does not appear that defendant disputes the circumstances surrounding the failed delivery of the CD. Accordingly, the trial court did not abuse its discretion by failing to vacate its summary disposition order because further discovery would not have supported defendant's position.

Affirmed.

/s/ Henry William Saad

/s/ David H. Sawyer

/s/ Jane M. Beckering